No. 16,170

IN THE

United States Court of Appeals

For the Ninth Circuit

GLADYS LAYCOCK,
Appellant,

vs.

FRANK J. KENNY,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S PETITION FOR A REHEARING.

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APPELLANT'S PETITION FOR A REHEARING.

Appellant respectfully moves the Court to set aside its opinion as heretofore filed herein and to grant a rehearing of this cause. As grounds therefor appellant submits the following.

The opinion of this Court holds that there was no "taking" of appellant's property in the constitutional sense. That issue was not decided by the District Court and was not briefed or argued in this Court.

This Court so ruled without citing the controlling decisions of the Supreme Court, which we submit hold to the contrary. Such controlling decisions in and of themselves establish the necessity for a rehearing by this Court. We will cite and quote those controlling decisions after a brief statement of facts.

ESSENTIAL FACTS NOT STATED IN THE OPINION.

The patent to this mining claim was issued by the government for a valuable consideration. The owner developed the mine in reliance upon the terms of that patent. That patent was a grant of the right to extract, possess and dispose of the mineral.

Erhardt v. Boaro, 113 U.S. 527 at 535;
USCA Title 30, Sections 22 to 26.

> "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."
>
> *Penna Coal Co. v. Mahon,* 260 U.S. 393 at 414.

Under the laws governing the issuance of patents for mining claims, the right of a patentee to mine, possess and dispose of her gold is absolute; as absolute as the right of one who has acquired title to land by a patent from the government. Mining claims and land are sold by the government for a valuable consideration under patents. When such a conveyance is made, the rights of the grantee are absolute. Thereafter such a grant cannot be revoked or altered by the government.

Such a mining claim patented by the government, like lands patented by the government, constitute the absolute property of the grantee. If for a public purpose or in the public interest the government wishes to terminate the property rights which it had granted—a right to own, possess and sell the minerals—the gov-

ernment must condemn the property and pay just compensation, which compensation must be determined by the Courts.

The Constitution protects the right to produce, own and dispose of the metal in that claim as an essential attribute of the property.

Terrace v. Thompson, 263 U.S. 197 at 215.

> "* * * the right of the owner to fix the price at which his property shall be sold or used is an inherent attribute of the property itself and, as such, is within the protection of the due process clauses of the fifth and fourteenth amendments."
>
> *Tyson Bros. v. Banton,* 273 U.S. 418 at 429.

Price control is unconstitutional.

See authorities cited at pp. 42 and 43 of main brief.

FACTS ESTABLISHED BY THE OPINION.

The opinion of this Court establishes

(a) That "the Regulations effectively set the price of gold in the United States". (Op. p. 8);

(b) That the Regulations make it impossible for appellant to exercise the rights granted by the patent, i.e., the right to produce, own and sell the mineral (sic). Appellant alleges that the price has ruined the gold mining industry (p. 19);

(c) The authority given by the statute "makes the Treasury the ruler of the market place, if not the market itself";

(d) The statute authorizes the mints to pay $35.00 per troy ounce of fine gold * * * and authorizes the mints to sell gold to persons licensed to purchase it at $35.00 per troy ounce.

In those findings this Court has established that the Regulations deprive the appellant of her property rights as granted by the patent from the United States, such rights being her right to mine, own and dispose of the gold in her claim;

(e) The opinion states "the Fifth Amendment * * * forbids the taking of private property without just compensation * * *". (Op. p. 17.)

THE BASIC AND CONTROLLING RULING OF THIS COURT.

The basic and controlling ruling upon which the conclusion of this Court rests is the ruling on the constitutional point, to wit, that the acts complained of and the Regulation do not constitute a "taking" in the constitutional sense. The opinion makes the following several statements:

(a) "* * * there is no taking in the constitutional sense * * *". (p. 18);

(b) "But as we have discussed above, the effects of this power on the appellant's property is not a 'taking' in the constitutional sense." (p. 19);

(c) "The Fifth Amendment, under which she asserts her rights, forbids the taking of property without just compensation, or the deprivation of it with-

out due process of law". *"But this provision refers only to direct appropriations."* (p. 17.)

With great respect for this Court, we submit that each of those statements is contrary to controlling decisions and that a reconsideration of the question by this Court must necessarily lead to a correction of those statements, and a different holding with respect to the constitutional question presented.

Under controlling decisions "a direct appropriation" is not necessary to constitute a "taking" of property in the constitutional sense. Under the controlling decisions where the effect of governmental action is so complete as to deprive the owner of all or most of his interest in the subject matter, such action amounts to a "taking", even though the government does not acquire title to or occupancy of the property. It is the deprivation of the owner rather than the accretion of a right or interest to the government which constitutes a "taking". Such is the law as declared by the uniform decisions of the Supreme Court.

Under the Fifth Amendment it is not necessary that property should be absolutely taken by the government, but a serious interruption of the common and necessary use of the property amounts to a taking.

Pumpelly v. Green Bay Co., 13 Wallace 166;
U. S. v. General Motors Corp., 323 U. S. 373;
U. S. v. Causby, 328 U. S. 256 at 261-2;
U. S. v. Kansas City Life Insurance Co., 339 U. S. 799 at 809-810;
Penna Coal Co. v. Mahon, 260 U. S. 393 at 414-415;

U. S. v. Welch, 217 U. S. 333;
Richards v. Washington Terminal Co., 233 U. S. 546;
U. S. v. Lynah, 188 U. S. 445 at 468 to 471;
U. S. v. Cress, 243 U. S. 316 at 324 to 329.

To aid the Court we now submit brief extracts from the above opinions:

In *Pumpelly v. Green Bay Co.,* 13 Wallace 166 the Court held that under the constitutional provisions it is not necessary that the land should be absolutely taken, and that a serious interruption of the common and necessary use of property amounted to a "taking". The Court made the following statement:

> "The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.
>
> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent,

> can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."
>
> 13 Wallace 177-178.

We know of no decision by the Supreme Court which has been cited and followed more frequently than the above decision in the *Pumpelly* case.

In *Penna Coal Co. v. Mahon,* a coal company had conveyed the surface of land but had reserved the right to remove all coal beneath the surface. A statute forbade the mining of coal in such a way as to cause the sinking of the surface. The effect was to deprive the owner of his right to mine and sell the coal beneath the surface.

The Court held that such statute was unconstitutional, since it deprived the owner of the coal of his right to mine the same and did so without just compensation. The Court said:

> "As said in a Pennsylvania case, 'for practical purposes, the right to coal consists in the right to mine it'. Commonwealth vs. Clearview Coal Co., 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to

> mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does."
>
> 260 U.S. 415.

The Court also said "if the Regulation goes too far it will be recognized as a taking". (p. 415.)

In *U. S. v. General Motors Corporation,* 323 U.S. 373, the Court made the following statement with respect to the provision of the Fifth Amendment directing that private property shall not be taken for public use without just compensation.

> "The critical terms are 'property', 'taken' and 'just compensation' ". (p. 377.)

The Court then said that the word "property" denotes the group of rights inhering in the citizen's relation to the physical thing *"as the right to possess, use and dispose of it"*. And then said *"the constitutional provision is addressed to every sort of interest the citizen may possess."*

The Court then said that where the effects of the governmental action are so complete as to deprive the owner of all or most of his interest in the subject matter, such action amounts to a taking, and that it is the *deprivation of the former owner rather than the accretion of a right to the sovereign which constitutes* the taking. The precise words of the Court are as follows:

> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one

> does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that *the deprivation of the former owner* rather than the accretion of a right or interest to the sovereign *constitutes the taking.* Governmental action *short of acquisition of title or occupancy has been held,* if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."
>
> 323 U. S. 378.

In *U. S. v. Kansas City Life Insurance Co.,* 339 U.S. 799, the Court held that destruction of agricultural value of land by flooding is a taking within the meaning of the Fifth Amendment.

In *U. S. v. Causby,* 328 U. S. 356, the proof showed that the government used airlanes for military aircraft over the owner's land at a low altitude. The result was the destruction of the use of the property as a commercial chicken farm.

The government conceded that if the flights over the property had rendered it uninhabitable, there would be a taking under the Fifth Amendment, but argued that since the flights were within the minimum safe altitudes they were an exercise of the declared right of travel through the air space.

But the Supreme Court held that, under the facts, there was a taking pro tanto of the respondents' property which, because of the Fifth Amendment, had to be compensated. The opinion said, "if, by reason of the frequency and altitude of the flights respondents

could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken 'exclusive possession of it.' " (p. 261.)

In *U. S. v. Welch,* 217 U.S. 333, the government had condemned three acres of land and, by doing so, had cut off the use of a right of way and deprived the plaintiff of the only practical outlet from his farm to the county road.

The government did not condemn the right of way and there was no direct appropriation thereof. But the Court held that the destruction of the farmer's right was the taking of his property, which compelled the payment of just compensation.

The Court specifically stated:

> "* * * a destruction for public purposes may as well be a taking as would be an appropriation for the same end".

In *U. S. v. Cress,* 243 U.S. 316, the Court said :

> "While the government *does not directly* proceed to *appropriate* the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested." (p. 328.)

In *U. S. v. Lynah,* 188 U.S. 445 at 470, the Court said again:

> "While the government *does not directly* proceed to *appropriate* the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."

Thus the uniform decisions of the Supreme Court expressly hold that the Fifth Amendment is not limited to cases of direct appropriation, but that the Fifth Amendment prevents the government depriving the citizen of any of his property or property rights without just compensation.

As the Court said in a *General Motors* case,

> "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking."
> 323 U.S. 378.

But, contrary to the above decisions, this Court holds that under the facts here there has been no "taking", and that the Fifth Amendment refers only to "direct appropriation".

Under the above controlling decisions those rulings by this Court are erroneous and should be corrected.

The opinion uses the phrase "direct appropriation" and says that here there has been none.

"Direct appropriation" is not the phrase used in the Fifth Amendment. It has a much narrower meaning than the word "taking". The phrase "direct appropriation" is ambiguous and misleading.

Under the uniform decisions the Fifth Amendment prohibits the taking of property for public use without just compensation and is not limited to a direct appropriation by the government, but applies to all "takings" by the government.

Possibly, this Court used the phrase because in the *Norman* case, 254 U.S. at page 305, the Supreme Court said that the Legal Tender Decision had said that the Fifth Amendment referred only to a direct appropriation.

The context in the opinion and the issues in the Legal Tender Case explain the use of the phrase there.

In the Legal Tender Case the Court used the phrase "direct appropriation" as meaning a taking of property *by the Government,* as distinguished from the operation of a general law which would not *directly* take the property of a citizen, but which might indirectly cause loss or harm to an individual in dealings between individuals.

The distinction is a sound one and is made clear by the decision in the *Pumpelly* case, *which was decided by the same Justices, who had decided the Legal Tender Case.*

In the *Pumpelly* case that Court held that the purpose of the Fifth Amendment is:

> "* * * for the protection of the rights of the individual as *against the Government".*

And then the Court said that the Fifth Amendment was never supposed to inhibit laws that:

> "indirectly work harm or loss to individuals".
> 13 Wallace, page 177.

The opinion held that even though the government had not directly appropriated the property (sic); had refrained from "absolute conversion of the property

to the uses of the public", nevertheless the value of the property had been destroyed, and that such destruction had been a taking.

The opinion specifically stated that the word "taking" could not be restricted to a narrow sense and that to do so would pervert the constitutional provision. (13 Wallace at p. 178.)

The same justices, who rendered that specific and precise decision with respect to the Fifth Amendment, when the meaning of that amendment was directly in issue, had also decided the Legal Tender Case.

In the Legal Tender Case the parties had not asserted that the Act had violated the Fifth Amendment. They could not have made that contention because the Fifth Amendment is a protection of the individual solely against the Government, and not a protection as between *private parties inter sese.*

Public Utilities Commission v. Pollak, 343 U. S. 451 at 461.

No actions by an individual against another can violate the Fifth Amendment. Probably no law, which operates only between individuals, can violate the Fifth Amendment.

For that reason in the Legal Tender Case the contention was only that the Legal Tender Act was "prohibited by the *spirit* of the Fifth Amendment". (12 Wallace, p. 551.)

And thus, in the Legal Tender Decision the Court said that the Fifth Amendment referred only to:

"a *direct* appropriation."

The context shows that the opinion was merely distinguishing between

(a) a general law which might *indirectly* cause loss or harm to an individual, and

(b) the "taking" of an individual's property by the government.

In making that distinction, the opinion used the phrase "direct appropriation" to mean a "taking". It did not mean that there was no taking because the government had not directly appropriated the property.

That is made exquisitely clear by a decision of the same judges in the *Pumpelly* case the following year.

In the *Pumpelly* case the language of the Fifth Amendment was analyzed and reviewed.

The *Pumpelly* decision held that government action causing irreparable and permanent damage to property constituted a "taking" and was prohibited by the language of the Fifth Amendment.

That the Fifth Amendment operates only as against the government, and not as between private parties, is evidenced by the decisions in the Gold Clause Cases.

The Norman case was a suit between private parties. The Court held as between *private parties* the joint resolution to be constitutional. (294 U.S. 240.)

But the Perry case was a suit against the government. The Court held the same joint resolution unconstitutional as *applied to Government obligations.*

In the *Perry* case the Court said:

> "there is a clear distinction between the power of the Congress to control and interdict the contracts of private parties * * * and the power of the Congress to alter or repudiate the substance of its own engagements * * *."
>
> 294 U.S. page 350.

Thus, we find no decision which holds, as an adjudication, that the Fifth Amendment applies only to direct appropriation.

But, the uniform decisions hold that any deprivation by the government of any property right of a citizen without just compensation is a "taking" of property in violation of the Fifth Amendment; and that, therefore, the Fifth Amendment is not limited to "direct appropriation".

In this case, by its direct action, the government has deprived the appellant of her entire property right—the right to mine, possess and sell the mineral. The government has made it impossible for her to use and work her claim. That is the extent of the appellant's property. A patent for a mining claim grants only those rights. Those rights have been destroyed.

> "The destruction of all uses of the property * * * has been held to constitute a taking * * *."
>
> *U. S. v. Causby,* 328 U.S. at 261 note.

Though it be asserted that the acts of the government are done under the constitutional power over money, or are related to that power, that makes no difference.

The Constitution gives power "to provide and maintain a Navy". Under that constitutional power, the government flew Navy planes at a low altitude and thereby deprived an owner of property of the right to use his property for a particular business—raising chickens.

The direct action of the government had deprived the owner of a part of the use of his property.

The Supreme Court held that there was a "taking" of his property within the meaning of the Fifth Amendment. (*U.S. v. Causby,* 328 U.S. 256.)

Here the government has deprived the owner of the only property right she possesses—the right to mine, use and sell the mineral. The government had granted her that right. The *direct* action of the government has deprived her of it.

We submit that these facts establish that there has been a "taking" of appellant's property within the meaning of the Fifth Amendment.

ALL CONSTITUTIONAL POWERS OF CONGRESS ARE SUBJECT TO THE LIMITATIONS IMPOSED BY THE FIFTH AMENDMENT.

The opinion of this Court refers to broad powers of Congress over money and the monetary system.

We do not discuss those powers, since however broad they may be, either under the Constitution itself or under the decisions construing it, there remains this indisputable fact: *the exercise of that power*

is subject to the limitations imposed by the Fifth Amendment. Every power granted to Congress by the Constitution is subject to the Fifth Amendment.

Monongahela Navigation Co. v. United States, 148 U.S. 312 at 336;

Louisville Bank v. Radford, 295 U.S. 559 at 589;

Currin v. Wallace, 306 U.S. 1 at 14.

Even the war power is subject to the Fifth Amendment.

Ex parte Milligan, 4 Wallace at 119.

That is basic law which has never been controverted. Under those decisions it necessarily follows that, even though Congress may have absolute power over money and monetary matters, yet the exercise of that power is subject to the limitation of the Fifth Amendment. Therefore, even though Congress might deem it necessary to take possession of all gold, and to deprive the owner of a mining claim of his right to mine and sell his gold, Congress cannot do so without paying just compensation, and such just compensation must be determined by the courts.

By holding that Congress sought control over all gold in the exercise of its monetary powers, this Court holds that such control is for a public purpose. That fact establishes the application of the Fifth Amendment.

The government also takes the appellant's property for a private purpose. The government takes the producer's gold at a price below its cost of production

and sells that gold to commercial users at the same price. It thus takes the property of "A" and gives it to "B". The government thereby subsidizes the commercial users at the expense of the consumer. That violates the "due process" clause of the Fifth Amendment.

Mora v. Megias, 223 Fed.(2d) 814 at 816.

The appellant so contended, but this Court held such contention to be "without merit" because of the holding by this Court that there was no "taking" of appellant's property. But the "due process" clause of the Fifth Amendment prevents that course and protects this appellant even if there had been no taking.

Missouri Pacific Railway v. Nebraska, 164 U.S. 403 at 417;

Thompson v. Consolidated Gas Co., 300 U.S. 55 at 79 to 81.

Furthermore, every conclusion of this Court, announced in its opinion, rests upon the holding that there has been no "taking" of appellant's property.

With great respect we urge that such holding is contrary to the controlling decisions above cited and quoted.

The government granted the right to mine, possess and sell this gold by its patent. That right was property.

We submit that, under the Constitution, the government cannot revoke or alter that grant without compensation, and that the statute, as construed by this

Court, makes it impossible for the owner of that claim to operate it profitably.

As this Court says, the grant of authority, attacked here, makes the Treasury the "ruler of the market place." (Op. p. 8.) When, as "ruler of the market place" the government sets the price of gold below the cost of production, and has thereby ruined the gold mining industry and made it impossible for the appellant to use her property profitably, we earnestly submit that the government has deprived her of her property and of her means of livelihood. Such deprivation of her property is a "taking" of that property.

Under Article III Section 1 of the Constitution, when property is taken by the government the compensation required by the Fifth Amendment must be set by a Court and not by an administrative agency. The opinion of this Court denies that right to this appellant and does so for the basic reason asserted in the opinion that there was no "taking" of her property. If, as we contend, there was a "taking", then that ruling is erroneous.

NORMAN v. B & O RAILROAD, 294 U. S. 240.

The *Norman* decision has no application to this case. The appellant contends that the government has no power to compel a citizen to surrender her private property in exchange for irredeemable paper currency

which has no fixed value. The opinion holds that such issue is settled by the *Norman* case.

We respectfully ask the Court to reconsider that ruling for the following reasons:

(1) The Joint Resolution applied only to contracts for the payment of *money—monetary obligations;* the *Holyoke* case, 300 U.S. 324 and the *Guaranty Trust Co.* case, 307 U.S. 243 were both decided because the Court *construed the contracts there in issue* to be *contracts for money*—monetary obligations. See 300 U.S. at 340 and 307 U.S. at 255.

The Joint Resolution applied only to *contracts for money.* By its terms it is limited to contracts for money.

(2) In the *Norman* case the parties did not question the power of the government to pay in irredeemable paper currency. They question only the amount of such currency to which they were entitled. They were obliged to accept that currency because the obligations were for *money* and, therefore, came within the Joint Resolution.

Such decisions do not sustain the power of the government to take private property, such as gold or any other commodity, and to compel a citizen to accept in exchange for it irredeemable paper currency.

(3) The Joint Resolution was held constitutional as between private parties and as applied to private contracts, but the same Joint Resolution was held unconstitutional as applied to government obligations.

Perry v. United States, 294 U.S. 330 at 354.

We submit that those decisions do not hold that the government may take private property in exchange for irredeemable paper currency without fixed value. The ruling in the *Perry* case would seem to indicate the contrary.

The opinion states that if appellant wishes to sell her gold, she could exchange payment only in legal tender. If she could exercise her constitutional right to sell her gold without interference by the government, it is true that she would have to accept payment in legal tender. But, under those circumstances, it is also true that she could receive for her gold a much greater amount of that currency than at the rate of $35.00 face amount of such paper currency per ounce of gold. The facts throughout the world, which are common knowledge, demonstrate that. The mere fact that the cost of production of gold in terms of such paper currency is more than $35.00 per ounce established that that price in such paper currency is not just compensation.

In conclusion we submit that the subject of money has nothing to do with this case; that the injection and discussion of money in this case has confused the basic issue.

The basic issue here is whether the Federal Government, after having granted an absolute property right, the right to mine gold, may prohibit the exercise of that right and, thereby, deprive the appellant of her property without just compensation.

For a long period of years gold was our money and we are still accustomed to thinking of gold as money, but an appreciation of realities will demonstrate that gold is no longer money within the United States in any sense of the word, and that gold has no relationship whatsoever to the monetary system or paper currency system which we are now using.

The Federal Courts are the guardians of the constitutional rights of the people and of the constitutional limitations upon federal powers.

We earnestly petition this Court to grant a rehearing in this case in order that the appellant may be heard on the basic and controlling issues of constitutional law which control this case.

We remind the Court again that the basic issue upon which the decision of this Court turns was neither briefed nor argued before the Court.

We pray for a reconsideration and a rehearing.

Dated, September 25, 1959.

Respectfully submitted,

NORMAN L. EASLEY,

PAUL BAKEWELL, JR.,

Attorneys for Appellant and Petitioner.

Certificate of Counsel

We hereby certify that we are of counsel for appellant and petitioner in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, September 25, 1959.

Norman L. Easley,
Paul Bakewell, Jr.,
Of Counsel for Appellant and Petitioner.